# THE CONSTITUTION

## AND WHAT IT MEANS TO-DAY

EDWARD S. CORWIN

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BY

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## PREFACE.

The Constitution as here printed is for the most part the text which appears in Old South Leaflets, No. 1.

I avail myself of this opportunity to express my thanks to two of my colleagues, Professor Dana C. Munro and Professor Christian Gauss—to the former for suggesting this small volume and to the latter for several ideas which have been incorporated in it to its improvement.

THE AUTHOR.

# INTRODUCTION

Notwithstanding Mr. Bryce's assurance that the Constitution can be read through in twenty minutes, comparatively few people undertake the task nowadays. This unfortunate circumstance is doubtless to be explained by several reasons, but there is one of these reasons which is of special importance. This consists in the fact that in the course of 130 years the real constitution of the United States has come to be something very different from the document referred to by Mr. Bryce.

It was the wise purpose of the men who framed the Constitution to avoid what one of them called "a too minutious wisdom." Being desirous that their work should endure, they for the most part laid down only general principles. The framework of the new Government was, it is true, outlined quite distinctly, but the real scope of the powers which it should exercise and of the rights which it should guarantee was left, to a very great extent, for future developments to determine.

Moreover, in the course of 130 years conditions of life, and with them political tendencies, have undergone great changes. In the case of an instrument couched in such broad terms as is the Constitution, a great deal depends upon the point of view from which the work of interpreting it is approached. To be sure, the final word in inter-

preting the Constitution belongs to the Supreme Court, a body whose membership alters only very gradually; yet it does alter and even if it did not, its members could not remain unaffected by widespread changes among their countrymen as to political philosophy and outlook.

Thus at one time the Constitution has been interpreted from the point of view of the desire for national unity, at another time from that of the desire for local autonomy; at one time from the point of view of concern for private rights, at another from that of concern for majority rule.

Inevitably, the interpretations rendered from these often conflicting points of view have constantly modified—sometimes cancelled—one another, and what the Constitution means to-day is, so to speak, their algebraic sum. But whence are the items of this calculation to be obtained? To some extent from the history of actual practice under the Constitution, to some extent from the amendments which have been formally added to it, but to a more important extent from the hundreds of decisions which have been handed down by the Supreme Court in interpreting its provisions.

To gather all these items together, however, and sum them up is obviously a task which the average citizen has no time to perform for himself. It is

accordingly this very task which this small volume endeavors to perform for him. As to the need for the kind of thing here attempted there can be little doubt. The Constitution is the People's Law; it is the substructure of government in the U. S.; it is the great mould in which all legislation, all governmental policy is cast. The citizen simply cannot perform his task intelligently without a considerable measure of familiarity with its provisions and their meaning to-day.

The Constitution was framed by a convention which assembled at Philadelphia toward the close of May, 1787, and adjourned on the following September 17th. This body was summoned by the Old Congress of the Confederation; its members were chosen by the several State legislatures—all the States but Rhode Island finally participating in its deliberations. Of the fifty-five members who attended, thirty-nine signed the Constitution, which was then submitted for ratification to conventions chosen in the several States for the purpose. Delaware was the first State to ratify. Then followed ten others in the following order: Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, New York. Under an act of the Old Congress the new Government went into effect on

March 4, 1789. North Carolina and Rhode Island did not ratify till later.

The thing which brought about the new Constitution was the apparently impending dissolution of the Confederation, which was attended, especially in New England, by social disorders. Even before the Revolution had come to an end, the union of States, which arose on the basis of the Declaration of Independence, had become extremely weak and ineffective, and once the war was over localism developed to an alarming degree. Moreover, within the boundaries of several of the States, there was a sharp division of society into creditors and debtors. The latter were often numerous enough to control the legislatures and abused their power by voting all kinds of measures calculated to avoid their legal obligations. Finally, Shay's Rebellion broke out in Massachusetts toward the end of 1786. A movement for a general convention to reform the Articles of Confederation had already been set on foot at the so-called "Annapolis Convention" of the previous September. The Massachusetts outbreak imparted to this movement just the necessary impetus both in Congress and the State legislatures to press it to rapid fruition.

Several writers with Socialistic sympathies have recently implied or stated that the Convention of

1787 was governed by unworthy motives, that in particular it was concerned to bolster the public debt of the Confederation, of which its members, it is alleged, were large holders. These allegations are refuted by several facts: In the first place, so far as has been shown, the members of the Convention held, in the aggregate, very little of the funded debt of the Confederation, and its leading members held scarcely any. In the second place, the Convention took absolutely no action regarding the Continental Currency, which was the principal evidence of the Confederation's public indebtedness. In the third place, it voted down, ten States to one, a motion meant to guarantee payment of the funded debt at par.

Nor is there any valid criticism to be levelled against the membership of the Convention. This consisted in great measure of precisely the men whom one acquainted with the history of the times would expect to find there, men like Washington, Franklin, Madison, Hamilton, Dickinson, the two Pinckneys, Ellsworth, the two Morrises, Wilson, Sherman, Mason, Randolph, Rutledge, Livingston, and others who had already become recognized as the foremost men of the day. The two Adamses, Jefferson, and Jay did not attend, it is true; all of them except Samuel Adams were out of the country

at the time, and they all finally favored the adoption of this Constitution.

The one and only advantage which the members of the Convention sought from their work was one which they proposed to share with their fellowmen, the gain, to wit, of a better system of government. Nevertheless, it may be doubted whether their fellowmen were at first disposed to appreciate this service. The Constitution was ratified by the representatives of a minority of the American nation; in the graphic words of John Adams, it "was extorted from the grinding necessities of a reluctant people." Yet it did not continue a minority document for long. Less than a decade had passed ere it had become an object of popular veneration, the rallying point of every considerable political force in the country. What Bagehot says of the British monarchy may indeed be repeated of the Constitution for by far the greater part of its existence. It has "strengthened government with the strength of religion."

Some readers of these pages may feel that certain controverted points regarding the relations of the States to the Constitution have been disposed of rather cavalierly, in favor of the nationalistic point of view. It has to be admitted, as indeed is implied in what was said above, that constitutional inter-

pretation has undergoine several vicissitudes in this respect. The Constitution itself originally represented a revolution against the States' Rights principle. Later, however, it was itself, though less completely and much more gradually, revolutionized in favor of States' Rights. Then came the Civil War which, by force of arms, revolutionized it back again, and this time permanently, so far as one can judge to-day. On the fundamental issue, accordingly, of the nature of the Constitution and its source, I have felt free to adopt throughout the point of view of Chief Justice Marshall. At other points I do not believe that I have trod on anybody's controversional toes—at least I have not intended to.

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"In the Constitution of the United States—the most wonderful instrument ever drawn by the hand of man—there is a comprehension and precision that is unparalleled; and I can truly say that after spending my life in studying it, I still daily find in it some new excellence." J. William Johnson, in *Elkinson* v. *Deliesseline, 8 Federal Cases, 593 (1823)*.

"When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism * * *. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago." J. Holmes, in *Missouri* v. *Holland, U. S. Game Warden (April 19, 1920)*.

"The subject is the execution of those great powers on which the welfare of a nation essentially depends. * * * This provision is made in a Constitution intended to endure for ages, and, consequently, to be adapted to the various crises of human affairs." Chief Justice Marshall in *McCulloch* v. *Maryland, 4 Wheaton, 316 (1819)*.

## The Preamble.

> We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

While the Preamble is, strictly speaking, no part of the Constitution, it serves two very important ends: first, it indicates the source from which the Constitution comes, from which it derives its claim to obedience, namely, the people of the United States as defined below; secondly, it states the great objects which the Constitution and the Government established by it are expected to promote: national unity, justice, peace at home and abroad, liberty, and the general welfare.

"We, the people of the United States," in other words, We, the citizens of the United States, whether voters or non-voters. In theory the former represent and speak for the latter; actually from the very beginning of our national history, the constant tendency has been to extend the voting right more and more widely, until to-day, with woman's suffrage about to be established by the addition of the

Nineteenth Amendment to the Constitution (see p. 113), the time is at hand when the terms voter and citizen are to become practically interchangeable as applied to the American adult. Two ideas have aided this development: first, the idea that every citizen of a republican government is entitled to an immediate voice in the choice of his representatives; secondly, the idea that a republican government is entitled to consult directly the interests and desires of its citizens and to have the benefit of their views obtained at first hand in shaping its policies.

## ARTICLE I.

Articles I, II, and III provide the framework of the National Government. Article I defines the legislative powers of the United States, which it vests in Congress.

### *Section I.*

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

This means that no other branch of the Government except Congress may make laws.

### *Section II.*

[Par. 1.] The House of Representatives shall be composed of members chosen every second year by the people of the several

States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

The term "electors" here means simply voters.

[Par. 2.] No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

The term "inhabitant" means resident. Custom has also established the rule that a Representative shall be a resident of the district from which he is chosen.

[Par. 3.] Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one

Representative; and until such enumeration shall be made, the State of *New Hampshire* shall be entitled to choose three, *Massachusetts* eight, *Rhode Island and Providence Plantations* one, *Connecticut* five, *New York* six, *New Jersey* four, *Pennsylvania* eight, *Delaware* one, *Maryland* six, *Virginia* ten, *North Carolina* five, *South Carolina* five, and *Georgia* three.

This paragraph embodies one of the famous compromises of the Constitution. The term "three-fifths of all other persons" meant three-fifths of all slaves. Amendment XIII has rendered this clause obsolete and Amendment XIV, Section 2, has superseded it (see pages 103 and 108).

The basis of representation to-day is one for about every 212 thousand, and probably this number will be further increased in consequence of the census of 1920.

[Par. 4.] When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

[Par. 5.] The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

The powers of the Speaker have varied greatly at different times. They depend altogether upon the rules of the House.

The subject of impeachment is dealt with at the end of the next section.

## *Section III.*

> [Par. 1.] The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

This paragraph has been superseded by the recently adopted Seventeenth Amendment (see pp. 111–112).

> [Par. 2.] Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class, at the expiration of the fourth year, and of the third class, at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the

legislature, which shall then fill such vacancies.

This paragraph explains how it came about that one-third of the Senators retire every two years.

[Par. 3.] No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The term "inhabitant", as we have seen, means resident.

[Par. 4.] The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

This is the source of the so-called "casting vote" of the Vice-President, which has been decisive on more than one critical occasion. For the rest, the powers of the Vice-President as presiding officer depend upon the rules of the Senate.

[Par. 5.] The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

See Article II, Section I, Paragraph 6; p. 46.

> [Par. 6.] The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the members present.

Impeachments are charges of misconduct in office, and are comparable to presentments or indictments by a grand jury. They are voted by the House of Representatives by a majority vote, that is, a majority of a quorum (see Section V, Paragraph 1, below).

The persons subject to impeachment are "civil officers of the United States" (see Article II, Section IV; p. 63), which term does not include members of the House or the Senate (see Article I, Section VI, Paragraph 2; p. 14), who, however, are subject to discipline and expulsion by their respective houses (see Section V, Paragraph 2; p. 11).

The charge of misconduct must amount to a charge of "treason, bribery, or other high crimes and misdemeanors" (see Article II, Section IV; p. 63). But the term "high crimes and misdemeanors" is used in a broad sense, being equivalent to lack of that "good behavior" which is specifically required of judges (see Article III, Section I; p.

64). It is for the House of Representatives to judge in the first instance and for the Senate to judge finally whether alleged misconduct on the part of a civil officer of the United States falls within the terms "high crimes and misdemeanors", and from this decision there is no appeal

In 1803 a Federal District Judge was removed from office by the process of impeachment on account of drunkenness and other unseemly conduct on the bench. The defense of insanity was urged in his behalf, but unsuccessfully.

When trying an impeachment the Senate sits as a court, but has full power in determining its procedure and is not required to disqualify its members for alleged prejudice or interest. However, "when the President of the United States is tried, the Chief Justice shall preside", the idea being, of course, to guard against any danger of unfairness on the part of the Vice-President, who would succeed to the President if the latter were removed.

> [Par. 7.] Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

There have been several convictions upon impeachment in the course of our national history. Sometimes judgment has extended simply to removal from office, sometimes to disqualification for further office-holding under the National Government.

Since conviction upon impeachment does not constitute "jeopardy of life or limb" (see Amendment V; pp. 90–92), a person ousted from office by process of impeachment may still be reached by the ordinary penalties of the laws for his offense, if it was of a penal character.

### *Section IV.*

> [Par. 1.] The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

To a great extent State legislation under this paragraph has been superseded to-day by that of Congress. Elections for members of Congress take place on the Tuesday following the first Monday of November of the even years, in districts, "composed of a contiguous and compact territory", each district choosing one Representative by a plurality

of the votes cast, which votes must be by written or printed ballot, or by voting machine where this method is authorized by State law.

> [Par. 2.] The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

No such law has ever been passed, with the result that a new Congress, though elected in November of one year, does not assemble "in regular session" until December of the next, that is, more than a year after its election. In recent years, however, the President has frequently summoned a new Congress in special session some time after the March 4th succeeding its election (see Article II, Section III; pp. 59–60).

*Section V.*

> [Par. 1.] Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

If either house doubts the qualifications of anyone who claims to be a member it may suspend him pending investigation, by such vote as the rules of the house require. Moreover, the "qualifications" here referred to do not consist exclusively of the qualifications prescribed in Sections II and III above for Representatives and Senators, respectively. "Congress", it has been said, "may impose disqualifications for reasons that appeal to the common judgment of mankind." Thus in 1900 the House of Representatives excluded a Representative from Utah as "a notorious, demoralizing and audacious violator of State and Federal laws relating to polygamy and its attendant crimes."

> [Par. 2.] Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member.

This paragraph describes the power of each house over its members once they have been "seated", that is, have been recognized as duly qualified members.

> [Par. 3.] Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the ayes and nays of the members of either house on any question shall, at the desire of

> one-fifth of those present, be entered on the journal.

The obvious purpose of this paragraph is to make it possible for the people to watch the official conduct of their Representatives and Senators.

> [Par. 4.] Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

In addition to the powers enumerated above, each house also possesses certain other powers which are implied by the fact that it is a deliberative body or which are inherited, as it were, from the Parliament of Great Britain. Each house may pass resolutions, either separately or "concurrently" with the other house, with a view to expressing its opinion on any subject whatsoever, and may create committees to deal with the matters which come before it. Also, each house has certain powers of a judicial character over outsiders. If a stranger rudely interrupts or physically obstructs the proceedings of one of the houses, he may be arrested and brought before the bar of the house involved and punished by the vote of its members "for contempt"; but if the punishment takes the form of imprisonment it terminates with the session of the house imposing

it. Also each house has full power to authorize investigations by committees looking to possible legislation by Congress, which committees have the right to examine witnesses and take testimony; and if such witnesses prove recalcitrant, they too may be punished "for contempt", though in this case the punishment is nowadays imposed, under an Act of Congress passed in 1853, by the Supreme Court of the District of Columbia, for "misdemeanor".

### *Section VI.*

> [Par. 1.] The Senators and Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the Treasury of the United States. They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest, during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

"Treason, felony, and breach of the peace" cover violations of State laws as well as National. The provision concerning "speech or debate" removes every restriction upon freedom of utterance on the floor of the houses by members thereof except that supplied by their own rules of order.

> [Par. 2.] No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

Despite this paragraph Presidents have frequently appointed members of the houses as commissioners to act in a diplomatic capacity. The constitutionality of such a course is open to grave doubt, to say the least.

*Section VII.*

> [Par. 1.] All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

This provision is practically without effect, as the Senate may "amend" a revenue bill from the House by substituting an entirely new measure under the enacting clause.

> [Par. 2.] Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he

> shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

"Two-thirds" of each "house" means, of course, two-thirds of the same "house" which originally passed the bill, that is, two-thirds of that "house" as organized to do legislative business, which is two-thirds of the quorum thereof (see Section V, Paragraph 1; p. 10).

Before President Jackson's time it was generally held that the President ought to reserve his veto power for measures which he deemed unconstitu-

tional. To-day, however, the President exercises this power as he judges fit.

The veto power of the President is interesting to-day from two points of view: first, that of rendering the growing power of the President more responsible (see Article II, Sections III and IV; pp. 59–64); secondly, that of establishing an executive budget. Both these problems might be solved to some extent by reshaping the President's veto by constitutional amendment. Thus budget reform would obviously be helped by extending the veto to the separate items of appropriation bills and making it absolute in such cases. On the other hand, if the veto were abolished altogether in the case of acts of Congress repealing previous acts which conferred power on the President or his subordinates, powers thus conferred to meet an emergency could be easily withdrawn once the emergency was past.

> [Par. 3.] Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Repre-

sentatives, according to the rules and limitations prescribed in the case of a bill.

The phrase "may be necessary" means necessary to effect legislation. Accordingly "votes" taken in either house in the course of elaborating a legislative proposition need not be submitted to the President, nor resolutions passed by either house separately or by both houses "concurrently" with a view simply to expressing an opinion or to devising a common program of parliamentary action or to directing the expenditure of money appropriated to the use of the two houses. (See also Article V; pp. 78–79.)

*Section VIII.*

This is the most important section of the Constitution since it describes, for the most part, the field within which Congress may exercise its legislative power, which is also the field to which the President and the National Courts are in great part confined.

Congress's legislative powers may be classified as follows: First, its "enumerated" powers, that is, those which are defined rather specifically in paragraphs 1 to 17, following; secondly, certain other powers which also are specifically delegated in other parts of the Constitution (see Section IV, above; also Articles II, III, IV, and V, *passim,* and Amend-

ments XIII to XIX); thirdly, its power conferred by paragraph 18, below, the so-called "coefficient clause" of the Constitution, to pass all laws "necessary and proper" to carry into execution any of the powers of the National Government; fourthly, certain inherent powers, that is, powers which belong to it simply because it is the national legislature.

In studying each of the first seventeen paragraphs of this section, one should always bear in mind the 18th paragraph, for this clause furnishes each of the "enumerated" powers of Congress with its second dimension, so to speak.

> [Par. 1.] The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

Complete power of taxation is conferred upon Congress by this paragraph, as well as the largest measure of discretion in the selection of purposes for which the national revenues shall be expended. This complete power "to lay and collect taxes" is, however, later curtailed by the provision that no tax shall be levied on exports (see Section IX, Paragraph 5; p. 38). Also, since the United States

guarantees to every State in this Union a "republican form of government" (see Article IV, Section IV, below) Congress may not impair the essential instruments of State government.

Furthermore, Congress must levy its taxes in one of two ways: all "duties, imposts and excises" must be uniform throughout the United States, while, on the other hand, the burden of "direct taxes" must be imposed upon the States in proportion to population (see Section II, Paragraph 3, and Section IX, Paragraph 4; pp. 3 and 38).

"Duties" are customs duties. If a certain article imported from abroad is taxed 5% at New York it must be taxed at the same rate at San Francisco, etc.

"Excises" are taxes upon the production, sale, or use of articles; also taxes upon certain privileges allowed by law. If the sale of tobacco is taxed in Kentucky it must be taxed in all the other States and at the same rate.

"Imposts" is a general term comprehending both duties and excises.

"Direct taxes" are taxes levied directly upon property "because of ownership." In the famous Income Tax Case of 1895 the Supreme Court ruled that a general income tax was, so far as incomes derived from property were concerned, a "direct tax" and, therefore, one that must be apportioned

according to population. The effect of this decision was overcome in 1913 by the adoption of the Sixteenth Amendment (see p. 111). More recently the Supreme Court has declared that a tax on incomes must be regarded as a tax on the *use* of property to produce the income and is, therefore, in its nature an *excise tax*. It follows that income taxes must be levied uniformly throughout the United States. This does not mean, however, that large incomes may not be taxed at a higher rate than small incomes. All that it means is that incomes of the same size must be taxed at the same rate wherever they are found within the United States.

The Excess Profits Tax is a kind of income tax.

While the raising of revenue is the primary purpose of taxation it does not have to be its only purpose. Thus Congress, by laying down certain regulations for keeping the traffic in narcotic drugs open and above-board and thereby easily taxable, has brought this traffic under national control. Furthermore, there are some businesses which Congress may tax so heavily as to drive them out of existence, one example being the production of white sulphur matches, another the sale of oleomargarine colored to look like butter. Whether Congress has the right to levy a special tax upon the products of mines and factories employing child labor is a question now before the Supreme Court.

(See also "Due process of law" in connection with Amendment V; pp. 94–95.)

> [Par. 2.] To borrow money on the credit of the United States;

This paragraph, together with the one just discussed, and Paragraphs 5 and 6 following comprise what may be called the fiscal powers of the National Government. By virtue of these, taken along with the "necessary and proper" clause below, Congress has the power to charter national banks, to put their functions beyond the reach of the taxing power of the States, to issue paper money and confer upon it the quality of legal tender for debts, to tax the notes of issue of State banks out of existence, to confer on national banks the powers of trust companies, to establish a "Federal Reserve System," etc.

> [Par. 3.] To regulate commerce with foreign nations and among the several States, and with the Indian tribes;

"Commerce" is *traffic*, that is, the buying and selling of commodities, and includes as an important incident the *transportation* of such commodities from buyer to seller. But the term has also been defined much more broadly. Thus in the famous case of Gibbons *v.* Ogden, Chief Justice Marshall said: "Commerce undoubtedly is traffic, but it is

something more—it is intercourse"; and on the basis of this definition the Supreme Court has held that the mere passage of people from one State to another, as well as the sending of intelligence, as by telegraph, from one State to another, is "commerce among the States."

"Among the States," that is, involving more States than one; in other words, *interstate* in contrast to *intrastate* or *local* commerce.

The power "to regulate" is the power to control, to govern, to encourage, to promote, and in proper cases to prohibit.

As a matter of fact, Congress has exercised its powers over interstate commerce, for the most part, only over interstate *transportation,* and especially transportation by rail. But in this field its control over commerce has developed tremendously within the last few years.

Since the power to regulate is the power to promote, Congress may build railways and bridges, or charter corporations and authorize them to build railways and bridges; and it may vest such corporations with the power of eminent domain and render their franchises immune from State taxation. For the same reason, it has the broadest discretion in dealing with any sort of emergency which threatens to stop interstate transportation.

Again, Congress may regulate the rates of transportation from one State to another, or authorize its agent, the Interstate Commerce Commission, to do so. But the rates set must yield a fair return to the carrier on its property, since this property is being used in the service of the public, and to compel its public use without just compensation would amount to confiscation (see the "Private property" clause of Amendment V; pp. 95–96).

Furthermore, the Supreme Court has recently held that "wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other," Congress is entitled to regulate both classes of transactions. In other words, whenever circumstances make it "necessary and proper" for Congress to regulate *local* transportation in order to make its control of *interstate* transportation really effective, it may do so. Likewise, the Court has held that the Interstate Commerce Commission, and therefore, Congress, may take account of the intention of a consignee to send certain goods outside the State and on that ground regulate the transportation of such goods to him from points within the State. By the logic of these cases Congress, it would seem, could govern every stage in the *purchase* and *sale* of goods finally intended for a purchaser in a State different from that of the pro-

ducer, or, indeed, govern sales generally in the case of commodities the local and interstate traffic in which are not practically distinguishable.

But not only may Congress regulate the act of transportation from one State to another, but it may also regulate the *instruments* and *agents* thereof. Thus, by the Federal Employers' Liability Act of 1908, Congress enacted the rule of liability for railways engaged in interstate commerce to those of their employees who are injured while employed in connection with such commerce. In applying this act the Supreme Court has held a railway liable to an employee who was injured while carrying bolts to be used in repairing a bridge which was a part of a highway of interstate commerce. The logic of this case, too, if applied to "commerce" in the sense of *traffic,* might lead to interesting results.

As was indicated above, occasions may arise when the power to regulate "commerce among the States" becomes the power to prohibit it. Thus the safety of interstate commerce as a whole may require that certain portions of it be prohibited; as, for instance, the shipment of high explosives, except under stringent safeguards. Moreover, Congress may prevent the facilities of interstate commerce from being abused and made instruments of evil, either material or moral. Thus, it has

prohibited the transportation of women from one State to another for immoral purposes; also of lottery tickets from one State to another; also of impure foods. On the other hand, it was recently held that Congress may not close the channels of interstate commerce to the products of factories and mines which employ children under other than stated conditions. In this case the Court felt that the act of Congress was aimed not at a *traffic* evil in itself, as for example, the interstate traffic in lottery tickets, but at a matter exclusively within the control of the States, namely, the employment of certain kinds of labor in the business of manufacturing, etc. The Court's view of the matter is, at least, supported by the fact that while the vast majority of people regard the lottery business as utterly bad, they are quite willing to purchase or sell the products of child labor, even though they condemn child labor itself. In other words, the connection between the *employment* of child labor and *traffic* in the products of such labor seems too indirect, too remote, to be taken account of; and this was exactly the view of the Court.

Congress's power to prohibit foreign commerce, as by embargoes or restrictive tariffs, etc., is absolute, since in this field the national power over commerce is supplemented by the national control over our foreign relations.

The power of Congress to regulate interstate and foreign commerce is *exclusive,* and, therefore, may not be exercised by the States to any extent, even though Congress has not acted. The paragraph under discussion is, accordingly, not only a source of great power to the National Government, but it is also an important restriction on State legislative power.

Since the States may not tax interstate or foreign commerce, they may not tax the carrying of goods from one State to another, nor the receipts from such carriage, nor the negotiation of sales when the orders are to be filled by goods brought from other States. Also, they may not tax goods imported from abroad so long as these remain in the original package in the hands of the importer. The States may, however, tax the instruments of interstate commerce at a fair valuation as so much property within the State and receiving its protection. It is, of course, for the Supreme Court to say finally whether a State tax infringes upon Congress's power to regulate commerce.

States have also their so-called "police power"; that is, the power "to promote the health, safety, morals and general welfare." Laws passed in exercise of this power may often affect commerce incidentally, but if the resultant burden is not "ma-

terial" such laws are sustained by the Court. Thus, a State may require all engineers on railways, even those running interstate trains, to be tested for color-blindness, or may forbid the sale of oleomargarine colored to imitate butter, applying the law to oleomargarine brought from without the State, and illustrations might be multiplied. But it is always within the power of Congress to remove even such incidental burdens upon interstate commerce, while, to repeat what was said above, no "direct" burdens may be imposed by State laws upon interstate commerce even in the absence of Congressional regulation. Thus, a State may not regulate rates of transportation in the case of goods being brought from or carried to points outside the State; and while it may regulate rates for goods bound simply from one point to another within its own borders, yet even such rates are subject to be set aside by national authority if they discriminate against or burden interstate commerce.

Furthermore, such rates are brought by the "due process of law" clause of the Fourteenth Amendment under the control of the rule stated above for rates set by Congress and the Interstate Commerce Commission; that is, they must yield a fair return to the carrier on the value of its property (see p. 105).

[Par. 4.] To establish an uniform rule of naturalization, and uniform laws on the sub-

ject of bankruptcies throughout the United States;

Congress having exercised its power under both clauses of this paragraph, the States have no longer any power to deal with the subject matter of either. (See Amendment XIV, Section 1; p. 104.)

[Par. 5.] To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

[Par. 6.] To provide for the punishment of counterfeiting the securities and current coin of the United States;

Paragraph 2 above.

[Par. 7.] To establish post-offices and post-roads;

Congress's powers under this and the "commerce clause" together would enable it to take over the railroad and telegraph lines, in return for "just compensation" (see Amendment V, at p. 95).

From its power to establish post-offices the National Government derives its power to carry the mails, and this power carries with it the power to protect the mails and their quick and efficient distribution, as well as the power to prevent the postal facilities from being used for evil purposes. (See Amendment I; pp. 86–88.)

> [Par. 8.] To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

By virtue of this clause Congress has enacted various patent and copyright laws and has authorized international agreements on the subject of copyrights and patents.

> [Par. 9.] To constitute tribunals inferior to the Supreme Court;

See Article III, Section I; p. 64.

> [Par. 10.] To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

By virtue of this and the following paragraph Congress is made the final authority in defining the Law of Nations for the United States.

> [Par. 11.] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

This paragraph, together with Paragraphs 12, 13, 14, 15, 16 and 18 following, and Paragraph 1 of Section II of Article II, comprise what are ordinarily called the "war powers" of the United States. It must be remembered that even before

the Constitution was adopted the American people had asserted their right to wage war as a unit. It has accordingly been suggested that the National Government does not get its power to wage war from the Constitution, but that it possesses it as an inherent attribute of national sovereignty, and that what the above-mentioned clauses of the Constitution do is simply to regulate in some particulars the exercise of this power. From whatever source derived, the power of the National Government to wage war and, therefore, to take measures to wage it successfully is a power of vast scope, even as it affects the American people, while as against the enemies of the United States it is limited only by the rules of International Law. (See further Article II, Section II, Paragraph I, and Section III; pp. 49 and 60.) This power, moreover, is exclusive in the National Government, for the States have no power to wage war "unless actually invaded or in such danger as will not admit of delay" (see Section X, Paragraph 3; p. 41).

Congress's power "to declare war" is the same power which, in 1789, belonged to the King of Great Britain. It was rightly felt that in a republican government this power must be lodged with all the representatives of the people. Nevertheless, since that date the President alone has come to be recognized as also having a kind of war-declaring

power. Thus, if a nation actually begins war upon the United States, the President may recognize the fact and take such action as the situation demands and the acts of Congress allow. Also, the President, because of his initiative in the field of foreign relations, may easily produce a situation leading logically to war. Yet, in both these cases the President's action is necessarily provisional only; the final issue lies with Congress, which controls the purse, and so far as the Constitution is concerned, Congress is entirely free to choose whether it will back up the President's action or not.

The question has recently been raised whether Congress may declare peace. Unquestionably, it may repeal its authorization of hostilities, which is all that is meant legally by the term "war"; and while such repeal would not bring about peace in a way to bind the other party to the war, it would produce a technical condition of peace so far as the United States was concerned, of which both the courts and the Executive would have to take account.

"Letters of marque and reprisal" were formerly issued to privateers.

> [Par. 12.] To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

[Par. 13.] To provide and maintain a navy;

Congress may raise military and naval forces either by authorizing a call for volunteers or by conscription. Compulsory military service does not violate the Thirteenth Amendment, or any other part of the Constitution. Liability to it is one of the responsibilities of national citizenship. (See Amendment XIII; p. 103.)

In its measures for raising and supporting armies and for providing a navy, Congress may dictate the purposes for which these may be used. But so far as the statutes do not limit his discretion, and so long as he does not exceed the appropriations voted by Congress, the President may employ the armed forces of the United States as may seem to him best for the purpose of enforcing the laws of the United States and of protecting the rights of American citizens abroad under International Law.

The limitation of appropriations for the army to two years reflects the American fear of standing armies. For the navy, on the other hand, building programs may be laid down to run over several years.

[Par. 14.] To make rules for the government and regulation of the land and naval forces;

It is by virtue of this paragraph that Congress has enacted the so-called Articles of War and Articles for the Government of the Navy, which constitute the basis of military and naval discipline.

> [Par. 15.] To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;
>
> [Par. 16.] To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

For many years the militia was regarded as a purely State affair. By the National Defense Act of June 3, 1916, however, "the militia of the United States" is defined as consisting "of all able-bodied male citizens of the United States" and all similar declarants, between the ages of 18 and 25. The same act also provides for the nationalization of the National Guard, which is recognized as constituting a part of the militia of the United States, and provides for its being drafted into the military service of the United States in certain contingencies. The act rests on the principle that the right of the States to maintain a militia is always subordinate to the power of Congress "to raise and

support armies." (See also Section 10, Paragraph 3; p. 41.)

> [Par. 17.] To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

This paragraph is, of course, the source of Congress's power to govern the District of Columbia.

> [Par. 18.] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

What is a "necessary and proper" law under this paragraph? This question arose in the great case of McCulloch v. Maryland, and was answered by Chief Justice Marshall thus: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." The basis

of this declaration was furnished by three ideas: First, that the Constitution was ordained by the people and so was intended for their benefit; secondly, that it was "intended to endure for ages to come and, consequently, to be adapted to the various crises of human forces"; and thirdly, that while the National Government is one of enumerated powers, it is sovereign as to those powers. Marshall's view was opposed by the theory that the Constitution was a compact of sovereign States and so should be strictly construed, in the interest of safeguarding the powers of those States. From this point of view the "necessary and proper" clause was urged to be a limitation on Congress's powers, and was interpreted as meaning, in substance, that Congress could pass no laws except those which were "absolutely necessary" to carry into effect the powers of the General Government. It is hardly necessary to say that Marshall's doctrine is today the accepted doctrine. (See also Article VI, Paragraph 2, and Amendment X; pp. 81–82 and 99.)

This clause of the Constitution is also important because of the large measure of control which it gives Congress over the powers of the other departments of government. It was the theory of the framers of the Constitution that ours should be a government founded on law.

Among the powers of the National Government are certain ones that have sometimes been assigned to it simply on the score that they are powers "inherent in a national government," or "inherent in sovereignty"; for instance, the power to acquire and govern territories, the power to exclude aliens, and, as we have just seen, the power to carry on war.

*Section IX.*

The purpose of this section is to impose certain limitations on the powers of Congress.

> [Par. 1.] The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

This paragraph referred to the African slave trade and is, of course, now obsolete.

> [Par. 2.] The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

The writ of habeas corpus is, perhaps, the most important single safeguard of personal liberty. It dates from, at latest, the 17th Century, and it is interesting to note that the Constitution simply

assumes that, of course, it will be a part of the law of the land. The importance of the writ is that it enables anybody who has been put under personal restraint to secure immediate inquiry by the courts into the cause of his detention, and if he is not detained for good cause, his liberty.

At the time of the Civil War President Lincoln temporarily suspended the writ without authorization of Congress, but admitted the likelihood that he had violated the Constitution, as undoubtedly he had. Subsequently Congress passed a law authorizing him to suspend the writ in certain cases.

The danger of a suspension of the writ is, of course, that the officers of the Government will make unwarranted arrests. The occasions when the privilege of the writ may be suspended are clearly occasions when "the public safety may require" that the Government should have the power to make arrests on suspicion, which they would, perhaps, find it difficult to back up by evidence.

[Par. 3.] No bill of attainder or ex post facto law shall be passed.

A "bill of attainder" is a legislative act charging somebody with treason and pronouncing a penalty upon such person, usually the penalty of death. Such acts were occasionally passed by the Eng-

lish Parliament down to the close of the 17th century (see also Article III, Section III, Paragraph 2; p. 73).

An "ex post facto law" is a law which imposes penalties retroactively; that is, upon acts already done, or which increases the penalty for such acts.

> [Par. 4.] No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be be taken.

A "capitation" tax is a poll tax.

"Direct tax" was defined under Section VIII, Paragraph 1, above.

> [Par. 5.] No tax or duty shall be laid on articles exported from any State.

"Exported" means exported to a foreign country.

> [Par. 6.] No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another.
>
> [Par. 7.] No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

This paragraph, by the support it lends to Congress's control of the purse, also lays down one of the most important safeguards of the Constitution. The official whose business it is to see that it is lived up to is the Comptroller of the Treasury.

> [Par. 8.] No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign State.

*Section X.*

The purpose of this section is to impose certain restrictions on the States, principally in the interest of giving the National Government exclusive control in the field of foreign relations, of war, of currency and of commercial regulation.

> [Par. 1.] No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money, emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, or grant any title of nobility.

A "treaty" is different from an "agreement" (see Paragraph 3). The purpose of an agreement is

the performance of a specific act; the purpose of a treaty is the establishment of a permanent condition of things or the setting up of a rule of action which will operate until the treaty comes to an end.

"Bills of credit" are bills based on the credit of the State.

A "law impairing the obligation of contracts" is a law weakening the contract in some way. The clause was framed more especially for the purpose of preventing the States from passing laws to relieve debtors of their legal obligation to pay their debts, the power to afford such relief having been transferred to the National Government (see Section VIII, Paragraph 4; p. 27). Later, the Supreme Court under Chief Justice Marshall extended the protection of the clause to public grants, first of land, then of charters to corporations. But even with this extension the clause no longer interferes seriously with the power of the States to protect the public health, safety, and morals, or even that larger interest which is called the "general welfare", for the simple reason that the State has no right to bargain away this power. Thus the mere fact that a corporation has a charter enabling it to manufacture intoxicating beverages will not protect it from the operation of a prohibition enactment. Similarly, a contract between two persons by which they agree to buy and sell intoxicating beverages

would be immediately cancelled by a prohibition law going into effect.

> [Par. 2.] No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

"Imports" and "exports" refer to goods brought from or destined to foreign countries. A tax on imports while they are still in the original package and in the hands of the importer is prohibited by this clause.

> [Par. 3.] No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

Does the National Guard consist of "troops" in the sense of this clause? The authors of the National Defense Act of 1916 evidently thought so. (See Section VIII, Paragraphs 15 and 16; p. 33.)

## ARTICLE II.

This article makes provision for the executive power of the United States, which it vests in a single individual, the President.

### *Section I.*

[Par. 1.] The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

"The executive power" is primarily the power and duty of the President to "take care that the laws be faithfully executed" (see Section III; p. 59). In addition, however, certain other powers are conferred upon the President in the following paragraphs, powers which in 1789 were part of the prerogative of the British monarch.

The President's term of four years begins on March 4 of the year following each leap-year, because March 4, 1789, was the date which the old Congress of the Confederation set for the Constitution to go into effect.

It will be noticed that the Constitution makes no provision regarding the re-election of a President. The understanding which limits any individual's

tenure of the office to two terms rests exclusively upon custom.

> [Par. 2.] Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

This and the following paragraph provide for the so-called "Electoral College". It was supposed that the members of this College would exercise their individual judgments in their choice of a President and Vice-President, but since 1796 the Electors have been no more than party dummies. The intervention of the College in the election of the President is, however, still a matter of some importance, since it permits the choice of President to be by States rather than by the country at large, with the result that the successful candidate may have considerably less than a majority, or even than a plurality, of the popular votes cast. Thus, suppose that New York and Pennsylvania were the only two States in the Union, and that New York with 45 electoral votes went Democratic by a narrow margin, while Pennsylvania with 38 electoral

votes and with a somewhat smaller population than New York went overwhelmingly Republican. The Democratic candidate would be elected, though the Republican candidate would have much the larger popular vote.

Down to 1832 Presidential Electors were generally chosen by the State legislatures themselves. To-day they are universally chosen by popular vote and, as was implied above, on State-wide tickets.

> [Par. 3.] The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority,

then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.

This paragraph has been superseded by Amendment XII (see pp. 101–103).

[Par. 4.] The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

Under the act of Congress the Electors are chosen on the Tuesday following the first Monday in November of every fourth year, the Electors of each State meet and cast their votes on the second Monday of the following January, and Congress meets to count the votes in the Hall of the House of Representatives at 1 o'clock P. M., of the second Wednesday in the ensuing February.

[Par. 5.] No person except a natural-born citizen, or citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

Would a person born abroad of American parents be eligible to the office of President? This question has never been answered. (See the opening clause of Section I of the Fourteenth Amendment: p. 104.)

Does "fourteen years a resident within the United States" mean residence immediately preceding election to office? This question also has never been authoritatively determined.

[Par. 6.] In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

By the Presidential Succession Act of 1886 Congress has provided that in case of the disqualification of both President and Vice-President the Secretary of State shall act as President provided he possesses the qualifications laid down in Paragraph 5 above; if not, then the Secretary of the Treasury, etc. In any case, the officer of the Cabinet who acts as President still retains his Cabinet post, since it is by virtue of his holding such post that he is called upon to act as President.

Congress has never passed any law for determining when a President is unable "to discharge the powers and duties" of his office so that the Vice-President should take his place, but there is little doubt that it might do so. A recent suggestion is that this function should be devolved upon the Cabinet, which being made up of the President's appointees, would probably be disposed to give his side of the case fair consideration.

Another question which the first clause of this paragraph leaves unsettled is whether the Vice-President, when he succeeds to "the powers and duties of the said office", becomes President. In all cases hitherto the occasion of the Vice-President's taking over the Presidential office has been the death of the President, and the Vice-President has promptly assumed the title of the President and, of course, has remained in office

until the end of the term. Probably these precedents also settle the question for those cases in which the Vice-President might be called upon to discharge the duties of the Presidential office on account of the President's resignation or removal. But surely it cannot have been the intention of the framers of the Constitution that a President should be permanently displaced for a merely temporary disability.

> [Par. 7.] The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he may have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

Is the President's salary diminished by being taxed by a general income tax of the National Government? There is no good reason why the President and other officers should not discharge the general duties of good citizenship unless their doing so would really hamper them in the performance of their official duties.

> [Par. 8.] Before he enter on the execution of his office he shall take the following oath or affirmation:
>
> "I do solemnly swear (or affirm) that I will faithfully execute the office of Presi-

> dent of the United States, and will to the best of my ability preserve, protect and defend the Constitution of the United States."

The fact that the President takes an oath "to preserve and protect" the Constitution does not authorize him to exceed his own powers under the Constitution on the pretext of preserving and protecting it. The President may veto a bill on the ground that in his opinion it violates the Constitution, but if the bill is passed over his veto, he must regard it as law until it is set aside by an authoritative judicial decision, since the power of interpreting the law, and therefore the Constitution, belongs to the Judicial Department of Government and not to the Executive Department.

### *Section II.*

> [Par. 1.] The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

The power of the President as Commander-in-Chief is primarily that of military command in war time, and is no greater for being vested in the President than it would be if it were vested in any other person. Since, however, it is vested by the Constitution in the President, it may not be transferred to another person by Congress. Incidentally, the Commander-in-Chief possesses, as against the persons and property of enemies of the United States encountered within the theatre of military operations, all the powers allowed a military commander in such cases by the Law of Nations. President Lincoln's famous Proclamation of Emancipation rested upon this ground. It was effective within the theatre of military operations while the war lasted, but no longer. (See Article IV, Section III, Paragraph 2, and Section IV; pp. 76–78.)

"The principal officers" "of the executive departments" have, since Washington's day, composed the President's Cabinet, a body utterly unknown to the Constitution. They are invariably of the President's own party and loyalty to the President is an indispensable qualification, although, of course, such loyalty may not be carried to the extent of violating the law.

It has been frequently suggested, once by a joint committee of Congress, that the members of the Cabinet should be given seats on the floors of

Congress, and permitted to speak there. There is obviously nothing in the Constitution which stands in the way of this being done at any time.

A "reprieve" suspends the penalties of the law; a "pardon" remits them.

"Offenses against the United States" are offenses against the national laws, not State laws.

Pardons may be absolute or conditional and may be conferred upon specific individuals or upon classes of offenders, as by amnesty; a special pardon, however, has to be formally accepted by the person to whom it is proffered in order to be effective. Pardons may issue at any time after the offense pardoned has been actually committed but not before the offense has been committed, for that would be to give the President a power to set the laws aside, that is, a dispensing power.

It is sometimes said that a pardon "blots out of existence the guilt" of the offender, but such a view is absurd. A pardon cannot qualify a man for a post of trust from which those convicted of crime are by law excluded. In such a case the pardoned man is in precisely the same situation as a man who has served his sentence. The law will punish him no further for his past offense, but neither will it ignore altogether the fact that he committed it.

Although Congress may not interfere with the President's exercise of the pardoning power, it may

itself, under the "necessary and proper" clause, enact amnesty laws remitting penalties incurred under the national statutes.

> [Par. 2, Cl. 1.] He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur;

It is usual to regard the process of treaty-making as falling into two parts, negotiation and ratification, and to assign the former to the President exclusively and the latter exclusively to the Senate. In fact, however, it will be observed, the Constitution makes no such division of the subject, but the President and the Senate are associated throughout the entire process of "making" treaties. Originally, accordingly, Washington tried to take counsel with the Senate even regarding the negotiation of treaties, but he early abandoned this method of procedure as unsatisfactory. In 1816, the Senate created the Committee on Foreign Relations as a standing committee, and through this medium most Presidents have kept rather closely in touch with Senatorial sentiment regarding pending negotiations. Moreover, ratification also belongs to the President, only he may not ratify a treaty with the result of "making" it, unless the Senate by a two-thirds vote of the members present—not

necessarily a quorum—advises such ratification and consents to it. And since the Senate may or may not consent, it may consent conditionally, stating its conditions in the form of amendments to the proposed treaty or reservations to the proposed act of ratification, the difference between the two being, that whereas amendments, if accepted by the President and the other party or parties to the treaty, change it for all parties, reservations merely limit the obligations of the United States thereunder. Amendments are accordingly resorted to in the case of bilateral treaties, and reservations in the case of international treaties, like the League of Nations Covenant. Of course, if the President is dissatisfied with the conditions laid down by the Senate to ratification he may refuse to proceed further with the matter.

The power to make treaties is bestowed upon the United States in general terms and extends to all proper subjects of negotiation between nations, but since a treaty to which the United States is party is both an international compact and "law of the land" it may not override specific provisions of the Constitution. Therefore, it may not change the character of the Government which is established by the Constitution nor take away its powers. The powers of the States, on the other hand, of themselves set no limit to the treaty-making power, any

more than to any other power of the National Government. (See Article VI, Paragraph 2, and Amendment X; pp. 81–82 and 99.)

How broad the scope of the treaty-making power is, is well illustrated by the recent treaty between the United States and Canada providing for the reciprocal protection of migratory birds which make seasonal flights from the one country to the other. Congress has passed a law putting this treaty into effect and authorizing the Secretary of Agriculture to draw up regulations to govern the hunting of such birds, any violation of these regulations to be subject to certain penalties. Both the treaty and the law have just been sustained by the Supreme Court, the latter as a law "necessary and proper" to put the treaty into effect.

How is a treaty enforced? Being "law of the land" the provisions of a treaty may, if it was the design of the treaty-making body to put them into effect without reference to Congress, be enforced in court like any other law when private claims are based upon them; and by the President, when the other contracting sovereignty bases a claim upon them. An example of the former case would be where an alien claimed the right to own land in the United States or to engage in business under the clause of a treaty between the United States and his home country. An instance of the

latter would be a demand by the other government for the extradition from the United States of a fugitive from justice. However, it frequently happens that treaty provisions contemplate supplementary action by Congress, as did, for instance, the treaty with Canada just referred to; and this is necessarily the case where money is needed to carry a treaty into effect (see Article I, Section IX, Paragraph 7; p. 38). Hence the question arises whether Congress is obliged to carry out a treaty which it alone may carry out. The answer is that it is not legally obliged to do so, since the Constitution generally leaves it full discretion as to whether or not it shall exercise its powers. But morally it would be obliged to carry out the pledges of the United States duly entered into unless in the specific situation before it it would be morally justified in not doing so.

Treaties of the United States may be terminated in accordance with their own provisions or by agreement with the other contracting party; or as "law of the land" they may be abrogated by act of Congress, but such abrogation still leaves the question of their international obligation outstanding.

Besides treaties proper, the President frequently negotiates agreements with other governments which

are not referred to the Senate for its advice and consent. These are of two kinds:

Those which he is authorized by Congress to make, and so rank as acts of Congress, such as reciprocity conventions; those which he makes on his own initiative.

The latter are usually temporary understandings and look toward the early completion of a formal treaty. Sometimes, however, their scope approaches that of regular treaties, as for example the Lansing-Ishii agreement of 1917, which was effected by an exchange of notes between the Secretary of State of the United States and a diplomatic representative of the Mikado. Such agreements can be regarded only as announcements of policy by the Administration entering into them, and as imposing no legal obligation of any sort upon the United States or any of its organs of government.

> [Par. 2, Cl. 2.] And he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law;

Except the President and the Vice-President all civil officers of the United States are appointive and

fall into two classes, the so-called "Presidential officers" and "inferior officers".

The steps of appointment in the first class are, first, their nomination by the President; secondly, their appointment "by and with the advice and consent of the Senate"; thirdly, their commissioning, which is also by the President (see Section III; p. 59).

Although Congress has not the power to appoint officers it has the right to lay down their qualifications, but some choice must be left to the appointing power. Thus the Civil Service Act leaves the appointing officer the right to select from *among* those who have best sustained the tests of fitness imposed by the act.

The offices of "ambassador", "public minister" and "consul" are recognized by the Law of Nations, and the President may nominate to them (or in a vacancy appoint temporarily), as occasion arises in our intercourse with foreign nations, but Congress may lay down the qualifications for such officers.

Besides "ambassadors" and "public ministers" there has sprung up in the course of time a class of "personal agents" of the President, in whose appointment the Senate does not participate. Theoretically these do not have diplomatic quality, but if their identity is known they will be ordinarily accorded it in the countries to which they are

sent. If such agents act simply as observers for the President or are dispatched to communities or governments without standing at International Law, they are legitimate enough. But resort to them should not be carried to such an extent as to defeat the evident purpose of the Constitution to lodge the important diplomatic business of the United States with representatives of the *United States* in whose appointment the Senate has participated.

"Shall be established by law": All civil offices of the United States except those of President, Vice-President, Judges of the Supreme Court, Ambassadors, Public Ministers and Consuls rest exclusively on acts of Congress.

> [Par. 2, Cl. 3.] But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

"Inferior officers" for the most part are officers subordinate to the heads of departments, but many classes of such officers are still appointed by the President with the advice and consent of the Senate because Congress has never vested their appointment in the President alone or in the heads of departments. It is an interesting question whether

the judges of "inferior courts" are "inferior officers" within the sense of this clause. If so, Congress might vest their appointment in the Justices of the Supreme Court.

> [Par. 3.] The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

"Happen" in this connection means "happen to exist"; otherwise if a vacancy existed on account of inaction of the Senate it would have to continue throughout the recess, and in this way the work of government might be greatly impeded.

*Section III.*

> He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

The duty conferred by the opening clause of this section has in recent years developed, at the hands of President Roosevelt and President Wilson, into a tremendous power of legislative leadership. The President's duty under this clause does not extend to the imparting of information which in the public interest should be kept secret, a matter of which the President himself is final judge.

The President has frequently summoned Congress into what is known as Special Sessions. His power to adjourn the Houses has never been exercised.

The power to "receive ambassadors and other public ministers" includes the power to dismiss them for sufficient cause; and the exercise of the latter power may, as in the recent case of Count Bernstorff, result in a breach of diplomatic relations, leading eventually to war. The same power also carries with it the power to recognize new governments or to refuse them recognition, also a very important power sometimes, as was shown in the case of President Huerta of Mexico. Finally, it may be said that it is the President's power under this clause taken together with his power in connection with treaty making and with the appointment of the diplomatic representatives of the United States that gives him his large initiative in determining the foreign policies of the United States.

The President, be it noted, does not enforce the laws himself, but sees that they are enforced, and this is so even in the case of those laws which confer powers upon the President directly rather than upon some head of department or bureau.

Because of his duty "to take care that the laws be faithfully executed", the President has the right to take any necessary measures which are not forbidden by statute to protect against impending danger those great interests which are entrusted by the Constitution to the National Government. He may order a marshal to protect a Justice of the Supreme Court whose life has been threatened, and his order will be treated by the courts as having the force of law. He may dispatch troops to points at which the free movement of the mails and of interstate commerce is being impeded by private combinations, or through the Department of Justice he may turn to the courts and ask them to use their power of injunction to forbid such combinations. In the same way he may use the army and navy to protect American rights abroad. In the language of the Supreme Court, his duty is not limited "to the enforcement of acts of Congress or of treaties of the United States according to their express terms," but includes "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection im-

plied by the nature of the Government under the Constitution".

The President's executive powers have been further enlarged in recent years by the growing practice on the part of Congress of passing laws in general terms, which laws have to be supplemented by regulations drawn up by the head of a department under the direction of the President. Under the legislation which Congress passed during the World War the following powers, among others, were vested in the President: to control absolutely the transportation and distribution of foodstuffs; to fix prices; to license importation, exportation, manufacture, storage, and distribution of the necessaries of life; to operate the railroads; to issue passports; to control cable and telegraph lines; to declare embargoes; to determine priority of shipments; to loan money to foreign governments; to enforce prohibition; to redistribute and regroup the executive bureaus. In carrying these powers into effect the President's authorized agents have put in force a huge number of executive regulations having the force of law. It used to be said that "Congress may not delegate its powers", but the rule nowadays has become that Congress may not delegate its powers unless it is convenient to do so. As the field of national power expands and the problems confronting the National Government

become more complex we must expect more and more of this sort of legislation.

Ex-President Taft says that the President's duty to "commission all the officers of the United States" is the most onerous "manual labor" thrust upon him by the Constitution.

### *Section IV.*

> The President, Vice-President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

Besides their liability to impeachment (see Section III, Paragraphs 6 and 7, above), the President's subordinates are liable to him, since as the law now stands, and has generally stood from the beginning of the National Government, he has a practically unrestricted power of removal. They are also responsible to the courts in various ways. Thus, an order of the President himself not in accordance with law will be set aside by the courts if a case involving it comes before them. Also, a subordinate of the President may be prohibited by writ of injunction from doing a threatened illegal act which might lead to irreparable damage, or be compelled by writ of mandamus to perform a duty definitely required by law, such suits being usually brought in

the Supreme Court of the District of Columbia. Finally, by common law principles, a subordinate of the President is personally liable under the ordinary law for any act done in excess of authority, nor will an order of the President exonerate him in such a case. The extent of the President's own liability to the ordinary law, while he is clothed with official authority, is a matter of some doubt. Impeachment aside, his principal responsibility seems to be simply his accountability, and that of his party, to the people on election day. (See also Article I, Section VII, Paragraph 2; pp. 14–16.)

## ARTICLE III.

This article completes the framework of the National Government by providing for "the judicial power of the United States".

### *Section I.*

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

"Judicial power" is the power to decide "cases" and "controversies" in conformity with law and by the methods established by the usages and principles of law.

Like "executive power," judicial power implies certain incidental powers, as for example the power to punish for contempt of court; but this power may be regulated in the case of the national courts by act of Congress.

Although the Supreme Court is provided for by the Constitution, its organization rests upon an act of Congress, but having been once established it cannot be abolished by act of Congress, although its size may at any time be thus enlarged.

The "inferior courts" covered by this Section comprise today the nine Circuit Courts of Appeals, the 80 or more District Courts, the Court of Claims, and the Court of Customs Appeals. Since they rest upon act of Congress alone, they may be abolished by Congress at any time; but whether their incumbents may be thus thrown out of office is at least doubtful. When in 1802 Congress repealed an act of the previous year creating certain Circuit Courts of the United States, it also threw their judges out of office. On the other hand, the Act of 1913 abolishing the Commerce Court, left its judges still judges of the United States. The latter

act undoubtedly represented the view of the best authorities.

The territorial courts, those of Hawaii and Alaska, do not exercise "judicial power of the United States", but a special judicial power conferred upon them by Congress, by virtue of its power to govern territories of the United States (see Article IV, Section III, Paragraph 2; pp. 76–77). Their judges accordingly have a limited tenure and are removable by the President.

### *Section II.*

[Par. 1.] The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

Whether a case is one "in law" or "in equity" is a mere matter of history. Criminal prosecutions

and private actions for damages are cases "in law", since these were early decided in England in the regular law courts. An application for an injunction, on the other hand, was passed upon by the Lord Chancellor, as a matter of grace, and so is a *suit* "in equity". In the National Government the same courts dispense both "law" and "equity", but the distinction between the two kinds of cases is still maintained, as it is in most of the States.

A case is one "arising under this Constitution, the laws of the United States, and treaties" of the United States, when an interpretation of one or the other of these is demanded for its final decision.

Cases "arising under this Constitution" are cases in which the validity of an act of Congress or a treaty or of a legislative act or constitutional provision of a State is challenged with reference to the Constitution. Since the Constitution is law (see Article VI, Paragraph 2), it must be interpreted and enforced by the judges in cases "arising" under it; since it is "*supreme* law" the judges must give it preference over any other law. Also, as is the case with any other law, judicial interpretation of it is final for the case to which it is applied and for like cases. It is upon these principles that the power of the courts rests to pass upon the validity of legislative acts under the Constitution.

It frequently happens that cases "arising under this Constitution, the laws of the United States, and treaties" of the United States are first brought up in a State court, in consequence of a prosecution by the State itself under one of its own laws or of an action by a private plaintiff claiming something under a law of the State. If in such a case the defendant sets up a counter claim under the Constitution or laws or treaties of the United States, thereupon the case becomes one "arising under this Constitution", etc. By the famous 25th Section of the Judiciary Act of 1789 (Section 709 of the Revised Statutes, and Section 235 of the Judiciary Code) such a case may be appealed to the United States Supreme Court on a "writ of error", if the decision of the highest State court to which by the law of the State it can come, affirms the claim based on the State law. (See also Amendment XI; p. 100.) Also a recent act of Congress enables the Supreme Court, by "writ of certiorari", to bring the kind of case just described before itself for final review on the point of law involved even if the claim which was based on State law was rejected by the State court in deference to national law. This was done for the reason that some State courts have in the past taken a broader view of certain clauses of the Constitution as limiting State power (see the "Due process of law" clause of Amendment XIV; p. 105).

than has the Supreme Court of the United States, and it was thought desirable that State legislation should be tested by the more liberal standards of the United States Supreme Court.

"Cases of admiralty and maritime jurisdiction" are not only cases arising from acts or injuries done upon the high seas and within the marine league, as at common law, but also for acts and injuries done upon "the navigable waters of the United States." Thus a collision on one of the Great Lakes would fall within this jurisdiction, as well as a collision at sea. The same jurisdiction also extends to all contracts and claims of a maritime nature, and, of course, in war time, to prize cases.

"Controversies" means "justiciable" controversies, that is, such controversies as are capable of being decided by a judicial tribunal; they are always of a civil nature.

The "controversies to which the United States shall be a party" are either controversies in which it appears as plaintiff or in which it has consented to be sued before the Court of Claims.

"Controversies between two or more States" to-day comprehends almost any sort of controversy between States of the Union. Recently, moreover, the Court has made it clear that it regards the National Government as possessed with adequate

authority to enforce the Court's decrees against any State which might fail to obey them.

Since the adoption of the Eleventh Amendment (see p. 100) "controversies between a State and citizens of another State" include only such controversies as are originated by a State. On the other hand, the grounds upon which such controversies may be based are today very broad, for in recent years the Supreme Court (see Paragraph 2, below) has recognized increasingly the right of a State government to intervene in behalf of important interests of its citizens, or a considerable section of them, and to ask the Court to protect such interests against tortious acts on the part of outside persons and corporations. Thus in what is probably the leading case the Court granted the petition of Georgia for an injunction against certain copper companies in Tennessee, forbidding them to discharge noxious gases from their works in Tennessee over the adjoining counties of Georgia.

The judicial power of the United States is extended to the kinds of controversies already mentioned because there is no other tribunal for such controversies. It is extended to controversies "between citizens of different States" for a quite different reason, namely, to make available a tribunal for such cases which shall be free from local bias. In this field, accordingly, Congress has felt free to

leave the States a concurrent jurisdiction, and as the statute now stands, the United States District Courts have original jurisdiction of controversies between citizens of different States in which 3,000 dollars or more is involved, while controversies of the same pecuniary importance, if brought by a plaintiff in a court of a State of which defendant is not a resident may be removed by the latter to the nearest United States District Court. The law involved in such controversies is ordinarily State law and the general principles of common law.

The word "citizens" in this clause as well as other clauses of this paragraph also includes corporations, a corporation being deemed to be a citizen of the State which charters it.

> [Par. 2.] In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

Jurisdiction is either original or appellate. In the famous case of Marbury *v.* Madison, in which for the first time the Supreme Court pronounced an act of Congress void as being in conflict with the

Constitution, it was held that Congress could not extend the original jurisdiction of the Supreme Court to other cases than those mentioned in the first sentence of this paragraph.

As we have just seen, Congress has extended the appellate jurisdiction of the Supreme Court in some instances to the State courts. Of course, it cannot do this except for cases to which the "judicial power of the United States" is extended by the Constitution itself.

The appellate jurisdiction of the Supreme Court as to fact is very much curtailed by Amendment VII (see p. 98).

> [Par. 3.] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

This paragraph is largely superseded by Amendment VI below.

*Section III.*

> [Par. 1.] Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless

on the testimony of two witnesses to the same overt act, or on confession in open court.

"Levying war" consists, in the first place, in a combination or conspiracy to effect a change in the laws or the government by force, but a war is not "levied" until the treasonable force is actually assembled.

One "adheres" to the enemies of the United States, "giving them aid and comfort", when he knowingly furnishes them with assistance of any sort.

"Overt act" means simply open act, that is to say, an act which may be testified to. Since treason by levying war involves a conspiracy, if an overt act of war in pursuance of the conspiracy takes place, all the conspirators are equally liable for it at the place at which it occurs.

[Par. 2.] The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forefeiture except during the life of the person attainted.

By this paragraph the cruel feature of the old common law which punished the traitor in the persons of his descendants was forever prohibited.

## ARTICLE IV.

This Article defines in certain important particulars the relations of the States to one another and of the National Government to the States.

### *Section I.*

> Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

By this Section the "public acts, records and judicial proceedings" of each State become entitled to receive the same force and effect that they have in the State of origin. A marriage good in one State is good in all; also, generally speaking, a divorce. A mortgage recorded for one State is recorded for all. A judgment rendered by the courts of one State must be enforced in accordance with the rules laid down by Congress in the courts of another State.

### *Section II.*

> [Par. I.] The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

This paragraph entitles the citizens of each State "to all privileges and immunities of citizens" in any State wherein they may be temporarily sojourning. But there are certain privileges and immunities for which a State may require previous residence, as for example the privilege of voting. It is for the Supreme Court to say finally whether a particular privilege is one of citizenship merely or one for which the additional qualification of residence may be fairly required.

> [Par. 2.] A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

The word "crime" here includes statutory crimes as well as common law crimes but does not include misdemeanors.

The performance of the duty which is cast by this paragraph upon the States has been imposed by act of Congress upon the governors thereof, but the Supreme Court has held that the act or duty is a discretionary one and that therefore its performance may not be compelled by writ of mandamus, and in consequence the governors of States have often refused compliance with a demand for extra-

dition when in their opinion substantial justice required such refusal.

> [Par. 3.] No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

"Person held to service or labor" meant slaves and apprentices. The paragraph is now of historical interest only.

*Section III.*

> [Par. 1.] New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

When new States are admitted into "this Union" they are admitted upon a basis of equality with the previous members of the Union, since "*this* Union" is a Union of equal States.

> [Par. 2.] The Congress shall have power to dispose of and make all needful rules

and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

Congress's control of the public lands is derived from this paragraph. Its power to acquire and therefore to govern territories, however, is derived, by best authority, from the fact that such a power is inherent in any national government.

While the treaty-making power may acquire territory, only Congress can incorporate it into the United States, which may be done either by admitting the territory into "this Union" as new States or, less completely, by extending the Constitution to it. Until territory is thus incorporated into the United States, Congress's power to govern it is nearly absolute, though doubtless it is limited by certain fundamental rights of persons.

Conquered territory may be governed temporarily by the President by virtue of his power as Commander-in-Chief of the Army and Navy, but Congress may at any time supplant such government with one of its own creation.

*Section IV.*

The United States shall guarantee to every State in this Union a republican form of

government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

"The United States" here means the political branches of the Government, that is, the President and Congress. A "republican form of government" means, strictly speaking, a government by the representatives of the people, and is to be contrasted with monarchy on the one hand and direct government on the other hand. But a considerable admixture of direct government does not make a government unrepublican; and whether the government of a State is republican in form or not is finally for Congress to say. Thus Congress may approve of the government of a new State by admitting it into the Union, or the houses of Congress may indicate their approval by seating the Senators and Representatives of the State.

The President is authorized by statute to employ the forces of the United States to discharge the duties of the United States under the second part of this paragraph.

### *Article V.*

The Congress, whenever two-thirds of both houses shall deem it necessary, shall

> propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

"The Congress, whenever . . . both houses shall deem it necessary": The necessity of amendments to the Constitution is a question to be determined by the two houses alone; and neither the President nor the courts have any voice in the matter.

"Two-thirds of both houses" means two-thirds of a quorum in both houses (see Article I, Section VII, Paragraph 2; p. 15).

"Legislatures" means the legislative assemblies of the States and does not include even their govnors, far less their voters.

Of the two methods here laid down for proposing amendments to the Constitution only the first has ever been resorted to, and all such amendments have been referred to the State legislatures. It is to be hoped, however, that in the future conventions will be called in the States, elected for the purpose.

Of the two exceptions here made to the amending power the first is today obsolete. The only change that the power which amends the Constitution may not make in the Constitution is to deprive a State without its consent of its "equal suffrage in the Senate". This follows, first, from the fact that this exception and no other is specifically mentioned which is today in force; secondly, from the fact that the amending power represents the people of the United States (see Preamble) in their ultimate capacity to change or alter their institutions at will. For if this supreme power is not provided for in this Article it is nowhere provided for in the Constitution, and the only way in which the people of the United States could exercise it would be by act of revolution.

## ARTICLE VI.

[Par. 1.] All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the confederation.

This paragraph, which is now only of historical interest, was intended to put into effect the rule of International Law that when a new government takes the place of an old one it succeeds to the latter's financial obligations.

> [Par. 2.] This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

This paragraph has been called "the linch pin of the Constitution", and very fittingly, since it combines the National Government and the States into one governmental organization, one Federal State.

It also makes plain the fact that, while the National Government is for the most part one of enumerated powers, as to its powers it is supreme over any conflicting State powers whatsoever. When, accordingly, a collision occurs between national and State law the only question is, whether the former was within a fair definition of Congress's powers. If it was, then the State law must give way, no matter by virtue of what power it was passed.

Finally, this paragraph, in establishing the obligation of State judges to prefer the laws of the United States which are "in pursuance of the Constitution" to conflicting State laws and constitutions, implies their right to say whether laws of the United States *are* in pursuance of the Constitution; and from their decisions on this question there may always be, as we have seen, a final appeal to the United States Supreme Court (see Article III, Section II, Paragraph 1; pp. 66–68).

> [Par. 3.] The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

State officers have many duties, both positive and negative, laid upon them by the Constitution (see Article I, Section III, Paragraph 1; Section IV, Paragraph 1; Section X; Article II, Section I, Paragraph 2; Article III, Section II, Paragraph 2; Article IV, Sections I and II; Article V; Amendments XIII, XIV, XV, XVII, and XVIII), and these may be increased frequently by Congress, by virtue of its "necessary and proper" powers. Thus

the recent Draft Act was enforced to a great extent through State officers. Hence, it becomes necessary that State officers should take the oath to support the Constitution, since for many purposes they are national officers. Indeed, the possible uses to which the State governments might be put as agents of the National Government have never yet been fully appreciated, but it may be supposed that as the powers of Congress expand and those of the State governments correspondingly contract, the latter may be utilized more and more by the National Government for administrative purposes.

A "religious test" is one demanding the avowal or repudiation of certain religious beliefs. While no religious test may be required as a qualification for office under the United States, indulgence in immoral practices claiming the sanction of religious belief, such as polygamy, may be made a disqualification. Contrariwise, alleged religious beliefs or moral scruples do not furnish ground for evasion of the ordinary duties of citizenship, like the payment of taxes or military service, although, of course, Congress may of its own free will grant exemptions on such grounds.

"Oath or affirmation": This option was provided for the special benefit of the Quakers.

## ARTICLE VII.

The ratification of the convention of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.[1]

Done in convention by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

George Washington, President, and Deputy from Virginia.

New Hampshire—John Langdon, Nicholas Gilman.

Massachusetts—Nathaniel Gorham, Rufus King.

Connecticut—William Samuel Johnson, Roger Sherman.

New York—Alexander Hamilton.

New Jersey—William Livingston, David Brearly, William Patterson, Jonathan Dayton.

Pennsylvania—Benjamin Franklin, Thos. Mifflin, Robert Morris, George Clymer, Thomas Fitzsimons, Jared Ingersoll, James Wilson, Gouverneur Morris.

Delaware—George Read, Gunning Bedford, Jr., John Dickinson, Richard Bassett, Jacob Broom.

Maryland—James McHenry, Daniel of St. Thomas Jenifer, Daniel Carroll.

Virginia—John Blair, James Madison, Jr.

North Carolina—John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler.

Georgia—William Few, Abraham Baldwin.

Attest: WILLIAM JACKSON, Secretary.*

## AMENDMENTS.*

The first ten amendments make up the so-called Bill of Rights of the National Constitution. They were designed to quiet the fears of mild opponents of the Constitution in its original form and were proposed to the State legislatures by the first Congress which assembled under the Constitution. They bind only the National Government and in nowise limit the powers of the States.

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* The first ten amendments were proposed in 1789, and declared adopted in 1791.

The eleventh amendment was proposed in 1794, and declared adopted in 1798.

The twelfth amendment was proposed in 1803, and declared adopted in 1804.

The thirteenth amendment was proposed and adopted in 1865.

The fourteenth amendment was proposed in 1866, and adopted in 1868.

The fifteenth amendment was proposed in 1869, and adopted in 1870.

The sixteenth amendment was proposed and adopted in 1913.

The seventeenth amendment was proposed and adopted in 1913.

The eighteenth amendment was proposed in 1917, and adopted in 1919.

## ARTICLE I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances

Congress may make *no law at all* "respecting an establishment of religion," nor yet "prohibiting the free exercise" of religious belief; and it may not make laws which *abridge* "the freedom of speech or of the press" or the rights of assembly and petition.

"An establishment of religion" means a state church, such as for instance existed in Massachusetts for more than 40 years after the adoption of the Constitution.

"The free exercise thereof" does not extend, as has already been suggested, to immoral practises. Hence Congress at an early date passed laws prohibiting polygamy in some of the territories.

"Freedom of speech" and "press" may be defined as the right of fair discussion of public men and measures. Such a right is absolutely indispensable to a republican form of government such as

ours. But *freedom* of utterance is not *license* of utterance, and it is only the former which is protected by this Amendment.

Outside of certain territories, as a matter of fact, Congress has no general power over either speech or press, but it has, of course, the power to make "all laws necessary and proper" to carry the powers of the National Government into effect; in short, to keep the Government working efficiently. What may be a "necessary and proper" restraint from this point of view upon speech and press at one time would not be at another. In time of war or public danger when even the privilege of the writ of habeas corpus may be suspended (see Article I, Section IX, Paragraph 2; p. 36), measures of restraint may go to lengths not allowable in quieter times. Yet at all times, it is generally conceded, Congress may ban utterances calculated to incite to violence or a forcible breach of the law; and this means in practice that it may ban utterances which to a jury of twelve Americans may seem calculated to do this.

Congress's control over the newspaper press is reinforced by its control of the mails (see Article I, Section VIII, Paragraph 7; p. 28). Few newspapers or periodicals can profitably circulate except locally unless they enjoy the "second class privilege," that is the privilege of specially low rates, and this

privilege is under the practically absolute control of Congress, and, by delegation, the Postmaster General. Moreover, Congress can banish from the mails altogether or even from the channels of interstate commerce, indecent, fraudulent, and seditious matter. For there can be no right to circulate what there is no right to publish.

The rights of assembly and petition are also to be defined with reference to the primary necessity of good order, but from the nature of the case the latter right would be ordinarily less affected by this consideration than the former. The right of petition implies the further right on the part of the petitioners that the Government at least give a hearing to their grievances.

### ARTICLE II.

> A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

The expression "a free State" is here used in the generic sense, and so refers to the United States as a whole as well as to the several States (see Article I, Section VIII, Paragraphs 15 and 16; p. 33).

The right "to bear arms" is the right to bear them openly, not in concealment.

ARTICLE III.

> No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

This and the following Amendment sprang from certain grievances which contributed to bring about the American Revolution.

ARTICLE IV.

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

"Houses" means dwelling places, not places of business.

The right to security of "papers and effects" supplements the provision in the following Amendment against self-incrimination. No one may be compelled to turn over to the authorities private papers which may be made the basis of proceedings against him. Nor may papers seized without a proper warrant by agents of the Government be used as evidence against him.

Whether a warrant is in such broad terms that a seizure under it would be "unreasonable" is, of course, finally for the Supreme Court to say.

### ARTICLE V.

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendments V, VI, and VIII constitute a "bill of rights" for accused persons. For the most part they are compiled from the Bills of Rights of the early State Constitutions, and in more than one respect they represent a distinct advance upon the English law of that time and indeed for many years afterward.

"Infamous crime" is one rendered so by the penalty attached to it. Any offense involving imprisonment or loss of civil or political privileges is, it

has been held, "infamous" in the sense of the Constitution.

"Presentment or indictment": A presentment is returned upon the initiative of the grand jury; an indictment is returned upon evidence laid before that body by the public prosecutor.

A "grand jury" consists of at least twelve and not more than twenty-three men chosen from the community by a process described by law. Once constituted it has large powers of investigation, but its presentments or indictments must have the support of at least twelve members.

"In time of war or public danger": This clause indicates that except for "the land and naval forces", etc., the Fifth Amendment is designed for times of war as well as for times of peace. But it is obvious that in order to enforce its provisions, as well as those of the following Amendment, the courts must be open. In regions where the courts are not open, or cannot, on account of disorder, function properly, martial law may be established by proper authority; but the necessity for its establishment will still be a question for the civil courts, and finally for the Supreme Court.

"Twice in jeopardy": A person has been once in jeopardy when a jury has returned a verdict on the facts in his case in a court having jurisdiction of it. This clause does not, however, prevent the

Government from taking an appeal on questions of law at any time before the return of such verdict.

"Life or limb" has come to mean life or liberty.

"Nor be compelled in any criminal case", etc.: This clause, which originated in the common law as a protest against the torture of witnesses, is today so broadly interpreted as to allow a witness to refuse to testify in any sort of judicial or quasi-judicial proceeding with reference to facts which he is legally advised would furnish a basis for criminal proceedings against himself. But Congress may at any time, by promising immunity from prosecution, put it beyond the power of a witness to claim the benefits of the clause; and, of course an accused person may, if he wishes, take the stand in his own behalf, but if he does so he at once waives his constitutional immunity completely.

"Nor be deprived of life, liberty or property without due process of law": The protection of this clause is by no means confined to accused persons, but extends to all persons in all circumstances in which their rights may be affected by any action taken by the National Government, while a like clause of the Fourteenth Amendment affords a similar range of protection against the States.

"Liberty" is not simply freedom from detention but also signifies all the ordinary rights which one enjoys as a member of the community.

"Property" means not merely physical possession of the thing owned, but the sum total of its permissible uses.

It should be noted, however, that this clause does not say that no person shall "be deprived of life, liberty or property" in any possible circumstance, but that "no person shall be deprived of life, liberty or property *without due process of law*". What then is "due process of law"? It is, briefly, that method of exercising the powers of government which either custom or justice sanctions for the kind of case which is under consideration.

In criminal proceedings "due process of law" is, so far as the National Government is concerned, the kind of process which is here described in the Fifth and Sixth Amendments.

In "actions at common law," "due process of law" in the national courts ordinarily includes, by the requirement of Amendment VII, trial by jury.

Generally speaking, too, "due process of law" exacts that the final interpretation of the law be left to the courts.

On the other hand, the ascertainment of facts, and even to some extent the interpretation of the law, may be frequently put by Congress into the hands of executive officers without violation of "due process of law." Whether an alien who wants to enter the country may do so or not, or

whether an alien already here shall be deported, are both questions which are to-day finally determined by the Secretary of Labor, in accordance with the acts of Congress regulating these matters. Also, whether a periodical is entitled to the second class privilege is a question for the Postmaster General to decide, and so on. In these cases the Government is not aiming to *punish* anybody, but is simply exercising its *self-protective powers* against certain dangers. "Due process of law" accordingly does not exact trial by jury for such cases, but only that the administrative body concerned act within the powers conferred upon it by law, that it give the person or persons to be affected by its orders an opportunity for a fair hearing, and that it do not act "arbitrarily."

But this clause also limits legislative power directly, in which sense it signifies that Congress may not exercise its powers "arbitrarily." Thus, if Congress should attempt to levy a special income tax on blue-eyed persons, or to exclude from the channels of interstate commerce the products of members of certain political parties or religious organizations, its action would be so outrageous an *abuse* of power as to amount to an action in *excess* of power, a fact which the "due process of law" clause simply makes plain from the point of view of personal rights. Also, there are certain types of

legislation which have occasionally fallen under the condemnation of this clause because of the novel restrictions which they have set to private liberty. Thus when Congress passed an act forbidding railroad companies to discharge their employees because of membership in labor unions, while still leaving such employees free to quit their employment at will, the Court set the act aside as violative of "due process of law." On the other hand, the Court has recently recognized that Congress may take extraordinary measures in an emergency to keep interstate commerce moving, and such measures may be "due process of law" even though they invade private rights very drastically.

In a word, the "due process of law" clause rules out all arbitrary exercise of governmental power; but an emergency may sometimes justify what would ordinarily be arbitrary.

The power which the Government exerts when it "takes private property" for "public use" is called the power of eminent domain. Before the Civil War it was generally denied that the National Government could exercise the power of eminent domain within a State without the consent of the State (see Article I, Section VIII, Paragraph 17). Today, however, it is well settled that the National Government may take property by eminent domain

whenever it is "necessary and proper" for it to do so, in order to carry out any of the powers of the National Government. It may also, in proper cases, vest this power in corporations chartered by it.

Property is "taken," generally speaking, only when the title to it is transferred to the Government or the Government takes over or assumes to control its valuable uses. It is not "taken" simply because its value declines in consequence of an exertion of lawful power by the Government. Thus, Congress may lower the tariff or declare war, etc., without having to compensate those who suffer losses as a result of its action.

What is a "public use"? The Government cannot take the property of one person and transfer it to another out of pure favoritism, even though it pay the original owner a fair price; but what may at first glance seem a private purpose may be a public one, as where a railroad company is vested with the power of eminent domain. What is a "public use" is in the first instance a question for Congress, but finally one for the Supreme Court.

"Just compensation" must be determined by an impartial body, not necessarily a court or a jury.

See also Article I, Section VIII, Paragraph 3, at page 23.

ARTICLE VI.

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

"A speedy trial" means a reasonably speedy trial, and the right to it may be secured by the writ of habeas corpus. "Public trial" does not mean one to which the public at large is admitted, but one to which representatives of the public and especially friends of the prisoner are admitted in order to see that justice is done. "Jury" means the common law jury of twelve.

"State and district": The prisoner is to have such benefit as may be derived from his reputation among his neighbors.

"Confronted with the witnesses against him": This is in order that he may be able to cross-examine them.

"Assistance of counsel": The relation between a prisoner and his counsel is a confidential one

and communications between them may on no account be divulged in court.

ARTICLE VII.

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

This Amendment, as we have seen, restricts the power of the Supreme Court of the United States in reviewing questions of fact upon appeal from the lower Federal courts. (See Article III, Section II, Paragraph 2; p. 82.)

ARTICLE VIII.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

"Cruel and unusual punishments" means cruel *and* unusual punishments; that is, a punishment is not forbidden merely because it is unusual. Thus, the penalty of death may be inflicted by electrocution.

ARTICLE IX.

> The enumeration in the Constitution of certain rights shall not be construed to

deny or disparage others retained by the people.

In other words, there are certain rights of so fundamental a character that no free government may trespass upon them, whether they are enumerated in the Constitution or not.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

There was a tendency before the Civil War to read this Article as if it said that the powers reserved *by* the States were not delegated to the United States. Obviously, the proper reading is that the powers reserved to the States are reserved to them by the Constitution and conditionally upon their not having been delegated to the United States nor prohibited to the States.

"States" means the State governments and the people of the States.

"The people" means the people of the United States; that is, the same people who ordained and established this Constitution (see Preamble), and, therefore, have the right to amend it at will in accordance with the procedure prescribed by it (see Article V; pp. 78–80.).

## ARTICLE XI.

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

This Amendment was inserted primarily in order to protect the States against suits for debt, but it is construed to prevent any kind of suit being brought in a national court against a State, not only "by citizens of another State," but even by the State's own citizens. A suit is, however, not "commenced or prosecuted" against a State by the appeal of a case which was instituted by the State itself against a defendant who claims rights under the Constitution or laws or treaties of the United States (see Article III, Section II, Paragraph 1; pp. 66–68.

Also, an officer of a State who is acting in violation of rights protected by the Constitution or laws or treaties of the United States may not, since he is acting contrary to "the supreme law of the land" (see Article VI, Paragraph 2; p. 81), claim the protection of this Amendment, and he may, accordingly, be prevented from so acting by writ of injunction.

## ARTICLE XII.

[Par. 1.] The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall

consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

[Par. 2.] The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

This Amendment supersedes Article II, Section III, above, of the original Constitution. It was inserted on account of the tie between Jefferson and Burr in the election of 1800. The difference between the procedure which it defines and that which was laid down in the original Constitution is in the provision it makes for a separate

designation by the electors of their choice for President and Vice-President respectively.

Articles XIII, XIV, and XV are the so-called War Amendments. Article XIII freed the negro from slavery, Article XIV made him a citizen and bestowed upon him civil rights, Article XV made him, temporarily at least, a voter.

ARTICLE XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

This Amendment was recently construed by the Supreme Court in the following language: "This Amendment was adopted with reference to conditions existing since the foundation of our Government, and the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery, which, in practical operation were intended to produce like undesirable results. It was not intended to interdict enforce-

ment of those duties which individuals owe to the State, such as services in the Army, militia, and the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."

ARTICLE XIV.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The opening clause of this section makes national citizenship primary and State citizenship derivative therefrom.

"Subject to the jurisdiction thereof": The children of foreign diplomats born in the United States are not subject to the jurisdiction of the United States, and, therefore, are not citizens of the United States.

"The privileges or immunities of citizens of the United States" are those privileges and immunities which they derive from their national citizen-

ship, not their State citizenship. They comprise, in other words, those privileges and immunities which the Constitution, the laws, and the treaties of the United States confer upon them, such as the right to engage in interstate and foreign commerce, the right to appeal in proper cases to the federal Courts, the right to protection abroad, and so on.

"Nor shall any State deprive any person of life, liberty, or property without due process of law": This clause, in a general way, imposes the same kind of limitations upon the powers of the States that the similar clause of Amendment V imposes upon the powers of the National Government. However, it should be noted that the Fourteenth Amendment does not impose on the States the same detailed requirements regarding criminal procedure that the Fifth and Sixth Amendments impose upon the National Government. For this reason the States are regarded as being left quite free by this Amendment in remodelling their laws of procedure. All that the Amendment requires of the States in this respect, the Court has stated, is that the accused person be given the right to a fair hearing in a tribunal having jurisdiction of his case, a definition of "due process of law" which would permit a State even to abolish trial by jury.

As we have seen, the principal legislative power

of the States is their "police power," which is the power to promote the public health, safety, morals, and general welfare. But not every measure that a State may enact in pretended exercise of its police power is necessarily constitutional. In order that it may be "due process of law" it must have "a real and substantial relation" to the recognized ends of the police power. Thus, a compulsory vaccination law, although a somewhat drastic invasion of the field of private liberty, is, nevertheless, "due process of law" because of its clear relation to the promotion of public health. On the other hand, a law which gave the occupant of a lower berth in a sleeping car the right to demand that the upper berth should not be lowered except for a purchaser was pronounced void as having no reasonable relation to the acknowledged ends of the police power. Again, a legislative measure must not operate with undue harshness upon private rights, unless it is clear that the general welfare cannot be otherwise promoted. Thus, while the State may forbid absolutely the manufacture and sale of intoxicating beverages, it may not treat private employment agencies so severely, since in the latter case the public end to be obtained can be obtained by regulation of the business. Furthermore, in applying this clause the Court has recognized that "jurisprudence is a progressive sci-

ence," and so has felt free at times to give its sanction to legislation which originally it regarded as violative of "due process of law." Thus, recently it has sustained a general ten-hour day law in the face of an earlier decision pronouncing a much more restricted measure on the same subject unconstitutional.

Summing the whole matter up, one may say that "due process of law" is reasonable law and that what is reasonable law will be determined by usage, by the prevailing morality and by the preponderant opinion of the community regarding the demands of the public welfare. If, then, the Court appears at times to hesitate to give its sanction to legislative novelties which invade the accustomed field of individual liberty, it is because it is not yet persuaded that these novelties have back of them "a strong and preponderant public opinion."

"Equal protection of the laws": This clause does not rule out legislative classifications, but only those which are "unreasonable" or "arbitrary." Thus, it is reasonable to deny aliens the use of shot guns, but it is not reasonable to deny them the right to work for a living. Again, it is reasonable to provide that whites and negroes shall travel in separate cars, but it is not reasonable to require that they shall be segregated as to their abodes.

Corporations are "persons" within the meaning of the Fourteenth Amendment, and so are entitled to the "equal protection of the laws". This does not mean that the law may not exact special duties of them, but it does mean that such duties must bear some reasonable relation to the fact that they are corporations or to the nature of the business in which they are engaged. Thus, in view of the special dangers to which the railroad business exposes the public, railroad companies may be required to stand the heavy expense of elevating their grade crossings. On the other hand, a railroad may not be required to pay attorney's fees for those who sue it successfully.

See also Article I, Section VIII, Paragraph 3, at page 27.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or

in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any

slave; but all such debts, obligations and claims shall be held illegal and void.

These sections are today, for the most part, of historical interest only.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Congress undoubtedly might claim under this section a vast power in the regulation of civil rights which it has never exercised.

## ARTICLE XV.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

While the right to vote may not be denied "on account of race, color, or previous condition of servitude," it may be denied upon other grounds, such, for instance, as that of illiteracy; and, in fact, most of the Southern States have imposed such tests, which, in their practical application, usually abridge the right of the negro to vote very seriously. Laws of this character render a State liable to have its representation in Congress reduced (see Amendment XIV, Section 2, above), but actually this penalty has never been imposed

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Not since 1876 has the National Government exercised any real power under this section, nor would public sentiment today sanction such action.

## ARTICLE XVI.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

The occasion and operation of this Amendment have already been discussed (see Article I, Section VIII, Paragraph 1; pp. 18–20).

## ARTICLE XVII.

[Par. 1.] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

[Par. 2.] When vacancies happen in the representation of any State in the Senate,

the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

[Par. 3.] This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

This Amendment, as was noted before, supersedes Article I, Section III, Paragraph 1.

## ARTICLE XVIII.

Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Intoxicating liquors": It is for Congress to define this term within reasonable limits. By the recently-enacted Enforcement Act it defines as intoxicating any beverage containing more than one-half of one per cent. of alcohol. The validity of this enactment is now before the Supreme Court.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Concurrent power": As hitherto used in Constitutional Law, the term "concurrent power" has signified a power on the part of the States to pass laws within some field of power belonging to Congress and such State laws have been held to be valid only until Congress acted. Literally, however, the term "concurrent power" would seem to signify power which must be exercised concurrently, that is conjointly. What meaning it has in this Amendment is also a question now before the Supreme Court. (See also Article V; pp. 78–80.)

## ARTICLE XIX.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. Congress shall have power, by appropriate legislation, to enforce the provisions of this article.

This amendment was passed by the House on May 21, 1919, and by the Senate on June 4, 1919. It was ratified by the Wisconsin legislature on June 5th. Since then it has been accepted by the legislatures of thirty-four other States. It needs therefore

but one more ratification (May 22, 1920) to make it a part of the Constitution.

## NOTE.

The reader who wishes to pursue the subject further is urged to go to the sources, that is, the decisions of the Supreme Court itself. The most recent and most compendious collection of leading cases on American Constitutional Law is that of Mr. Lawrence B. Evans, which is published by Callaghan and Co., of Chicago.